APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,

Appellee,

vs.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HJERBERT N. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER and HUGH L. HEMBREE, III,

Appellants.

INTERLOCUTORY APPEAL
FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE JAMES E. EDMONDSON,
DISTRICT JUDGE

Appellee filed this suit on behalf of all Oklahoma retail customer/ ratepayers of Oklahoma Gas and Electric Company, alleging that appellants breached a common law fiduciary duty to ratepayers by failing to rescind OG&E's Amended Power Sales Agreement with AES Shady Point, Inc. Appellants were members of the Board of Directors of OG&E when the agreement was approved by the Corporation Commission. Appellee's motion to certify and maintain this cause as a class action was granted by the trial court. In this interlocutory appeal, appellants assert that the trial court erred in refusing to dismiss this case for lack of subject matter jurisdiction and in granting appellee's motion to certify this matter as a class action.

ORDER OF THE DISTRICT COURT VACATED.
CASE DISMISSED FOR LACK OF
SUBJECT MATTER JURISDICTION.

Whit Pate,
Poteau, Oklahoma,

Thomas Dee Frasier,
Frasier & Frasier
Tulsa, Oklahoma,

Gene Stipe,
Stipe, Gossett, Harper, Estes, McCune & Parks,
McAlester, Oklahoma, For Appellee,

Hugh D. Rice, H.D. Binns, Jr. & Michael R. Perri,
Rainey, Ross, Rice & Binns,
Oklahoma City, Oklahoma,

James G. Wilcoxen,
Wilcoxen, Wilcoxen & Primomo,
Muskogee, Oklahoma,

Peter D. Clarke, Deborah H. Bornstein &
Deena S. Newlander,
Gardner, Carton & Douglas,
Chicago, Illinois, For Appellants.

WATT, J.:

SUMMARY OF FACTS AND PROCEDURAL HISTORY

In an effort to encourage the development of cogeneration and small power production facilities, and to reduce the demand for fossil fuels, the United States Congress enacted the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. 95-617, 92 Stat. 3117 (codified

as amended at 16 U.S.C. § 824a-3).[1] The Federal Energy Regulatory Commission ("FERC") was charged with promulgating rules implementing PURPA. 16 U.S.C. § 824a-3(a). One of the ways Congress chose to encourage the development of cogeneration and small power production facilities was to require electric utilities to purchase electric energy from such facilities.[2] Pursuant to 16 U.S.C. § 824a-3(f)(1) and 18 C.F.R. § 292.401(a), the State of Oklahoma designated the Corporation Commission as the state regulatory agency responsible for implementing and enforcing PURPA. Title 17 O.S. 1981 § 34.1 provided:

> The Commission shall have the power to implement and administer the Public Utility Regulatory Policies Act . . .
>
> The Corporation Commission shall adopt such rules and regulations as are necessary to implement the purpose of all federal laws which are administered or enforced by the Corporation Commission.[3]

In 1985, Oklahoma Gas and Electric Company ("OG&E"), a publicly held utility, entered into an Amended Power Sales Agreement

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[1] Cogeneration plants not only produce electricity, but steam or heat that can be used for industrial or commercial purposes. Congress found that such plants are inherently more efficient than typical generating plants that do not use residual energy. See American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402, 404-5, 103 S. Ct. 1921, 1924, 76 L.Ed.2d 22 (1983); Federal Energy Regulatory Comm'n ("FERC") v. Mississippi, 456 U.S 742, 750, 102 S. Ct. 2126, 2132, 72 L.Ed. 2d 532 (1982).

[2] Title 16 U.S.C. § 824a-3(a)(2) directed FERC to prescribe rules which "require electric utilities to offer to purchase electric energy from [qualifying cogeneration and small power production] facilities." In response, FERC mandated that "electric utilit[ies] shall purchase, in accordance with [applicable rate rules], any energy and capacity which is made available from a qualifying facility . . ." 18 C.F.R. § 292.303(a) (1984) (emphasis added).

[3] Section 34.1 was amended in 1987, but the amendments do not alter the substance of the above quoted provision.

("Contract") with AES Shady Point, Inc. ("AES"). Under the Contract, AES agreed to construct a 500 million dollar coal-fired cogeneration plant in LeFlore County, Oklahoma, and OG&E contracted to purchase all electricity generated by the facility for a period of 17 to 32 years. At the time the Contract was executed, the named appellants in this action were members of the Board of Directors of OG&E. The appellee, Charles D. "Charley" Wilson, is a customer/ratepayer of OG&E.

In accordance with PURPA and Corporation Commission rules, the Contract was submitted to the Commission for approval. After a hearing on September 20, 1985, a hearing officer recommended that the Contract be approved. Among other things, the hearing officer found that the proposed project would "avoid 300 MW [megawatts] of baseload capacity which OG&E would have built to meet the needs of its customers" and that "[a]pproval of the agreement . . . will result in direct savings to ratepayers of OG&E of approximately $1,090,000,000." In other words, according to projections at that time, approval of the Contract would allow OG&E to forego constructing facilities it would otherwise have had to build to meet the predicted electric energy demands of its customers and would save ratepayers an estimated one billion dollars.

On February 27, 1986, the Commission adopted the report of the hearing officer in its entirety and approved the Contract in Order No. 293731. The Commission found that the rates set forth in the Contract were "fair, just and reasonable, are in the best interests of the ratepayers, and are not discriminatory against either AES or OG&E." At the request of AES and acquiescence of OG&E, the Commission waived its Rule 58(H) for purposes of the approval proceeding. Such rule would have required the Contract to contain a provision empowering the Commission to later reopen the Contract, after proper notice and hearing, and alter its terms or otherwise finalize experimental purchase tariffs and special contracts. In the absence of such a "reopener" clause, the initial rates approved by the Commission were locked in for the life of the Contract. The record indicates that AES could not have secured financing for their venture without the Rule 58(H) waiver. As approved, the amounts paid to AES by OG&E under the Contract are passed on to OG&E's Oklahoma retail customers.

Although Commission Order No. 293731 was not appealed, Wilson has twice collaterally attacked the order to no avail. On May 1, 1990, Wilson sought an injunction in LeFlore County District Court to prohibit OG&E and AES from performing under the Contract. He contended that the Commission's waiver of Rule 58(H) was invalid and that the Commission lacked jurisdiction to issue the order due to inadequate notice of the hearing. The district court held the order valid and the Court of Appeals affirmed. *Wilson v. OG&E and AES*, Case No. 78,230 (Okla. Ct. app. Nov. 24, 1992) (unpublished opinion). This Court denied certiorari on March 17, 1993.

On March 4, 1991, Wilson commenced a proceeding before the Commission in which he sought vacation of the Commission's Order No. 293731. Again, he urged invalidity of the Rule 58(H) waiver and insufficiency of the hearing notice. The Commission dismissed Wilson's application with prejudice and the Court of Appeals affirmed. *Wilson v. Corp. Comm'n.*, Case No. 77,7671 (Okla. Ct. App. Nov. 10, 1992) (unpublished opinion). Wilson filed no motion for rehearing or petition for writ of certiorari.

Wilson filed the instant action in Muskogee County District Court on December 19, 1988. He has alleged that the Directors breached a common law fiduciary duty to all Oklahoma ratepayers of OG&E by (1) acquiescing to the Commission's waiver of Rule 58(H), (2) allocating all Contract payments to OG&E's retail Oklahoma ratepayers over the first five years of the Contract, and (3) failing to rescind the Contract when it became apparent that the proposed facility was no longer needed or feasible. Wilson seeks in excess of two billion dollars in damages, which he claims is the amount ratepayers will pay over and above those rates which otherwise would have been paid during the life of the Contract and in the absence of the new facility.

The present suit, as well as Wilson's two previous actions, emanate from OG&E's revelation that the entire burden of the Contract will be borne by Oklahoma ratepayers, while the total production from the AES facility will be transmitted into the State of Arkansas. (Arkansas ratepayers make up some 14% of OG&E's customers). OG&E also announced that

the cost to its Oklahoma ratepayers for the venture would be $532,898,000 over and above their ordinary electric bills for the five years commencing in 1991 through 1995. In 1988, OG&E's chief operating officer testified that a number of factors had arisen which made the construction of the plant infeasible, unnecessary and unneeded. He opined that the company did not need the production from the AES plant, could not use it before the year 2008, and even if needed then such production could be purchased elsewhere at a cheaper price. Finally, in May of 1987, approximately eight months before construction of the AES facility was started, Congress repealed the federal law prohibiting the construction of natural gas-fired plants. Wilson asserts that gas-fired plants can be constructed at one-third the cost of coal-fired plants and that the AES plant is located approximately 25 miles from one of the most prolific natural gas fields in the western world.

After several trial court rulings and interlocutory appeals,[4] the district court granted Wilson's motion to certify and maintain this cause as a class action on behalf of all Oklahoma retail customers/ratepayers of OG&E.

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[4] On March 21, 1989, the district court granted the Directors' motion to dismiss for lack of subject matter jurisdiction, holding that this cause was within the exclusive jurisdiction of the Commission. On November 6, 1990, in Case No. 72,951, the Court of Appeals reversed and remanded, holding that the case was not ripe because no payments had been made by OG&E to AES. As of that date, there had been no rate increase to ratepayers which could be the subject of Commission action. The appellate court also rejected the Directors' argument that Wilson's claim was actually a request for a rate refund governed by Commission rules. This Court denied certiorari on March 15, 1991.

After completion of the AES facility and the beginning of payments by OG&E to AES in February of 1991, the Directors filed an amended motion to dismiss for lack of subject matter jurisdiction. The district court denied the motion in orders dated October 4 and 17, 1991. The Directors' motion to dismiss on the grounds that this matter is preempted by PURPA and the Filed Rate Doctrine was denied by the district court on December 16, 1991. On December 23, 1991, the district court certified its October and December orders for interlocutory appeal. The Directors filed with this Court an application to assume original jurisdiction (Case No. 79,192) and a petition for writ of certiorari (Case No. 78,917) to review the district court's orders. On June 11, 1992, we denied both matters without opinion.

On August 11, 1992, the Directors filed this interlocutory appeal urging reversal of: (1) The district court's December 16, 1991, order denying their motion to dismiss for lack of subject matter jurisdiction based upon federal preemption; (2) the district court's July 13, 1992, order determining that this cause be certified and maintained as a class action; and (3) the November 6, 1990, opinion of the Court of Appeals in Case No. 72,951.[5]

ISSUE

The determinative issue in this appeal is whether the district court has subject matter jurisdiction to proceed. We hold that it does not. We conclude that Wilson's petition, as amended, fails to state a claim upon which relief can be granted. Oklahoma does not recognize a common law fiduciary duty on behalf of the Directors to the ratepayers of OG&E. We also find that any such cause of action, if recognized, would be preempted by PURPA and FERC regulations under the facts of this case. Finally, because this matter is essentially a rate refund case, we hold that jurisdiction lies exclusively with the Commission. The district court's July 13, 1992, order is vacated and this case is remanded with instructions to dismiss for lack of subject matter jurisdiction.

I.
PROPRIETY OF SUBJECT MATTER JURISDICTION INQUIRY

As a preliminary matter, we must address Wilson's argument that the issue of subject matter jurisdiction cannot be raised or addressed in this proceeding. Wilson asserts that this Court's review must be strictly limited to determining whether the prerequisites for class action certification, as set forth in 22 O.S. 1991 § 2023, were satisfied in the district court. We disagree. "[W]hether a trial court has jurisdiction over subject-matter of a cause is of primary and fundamental importance and *may be raised at any time.*" *Board of County Comm'rs v. City of Norman,* 472 P.2d 910, 913 (Okla. 1970) (emphasis added). *See also Woods Petroleum Corp. v. Sledge,* 632 P.2d 393, 394 (Okla. 1981). Furthermore, this Court has a duty to inquire into the jurisdiction of the trial court, even in the absence of a request by one of the parties. *Dickson v. Dickson,* 637

[5] *See* case history in note 4.

P.2d 110, 112 n.2 (Okla. 1981). Unlike the previous attempts by the Directors to have this Court address the issue of subject matter jurisdiction, the present interlocutory appeal is brought as a matter of right.[6] *See* 12 O.S. 1991 § 993(A)(6). We must therefore inquire into the district court's subject matter jurisdiction at this time.

In making the above ruling, we specifically reject Wilson's argument that this Court cannot consider the issue of subject matter jurisdiction because that issue was settled by the Court of Appeals in its October 6, 1990, opinion. *See* note 3. As a general rule, where an appellate court rules upon an issue, that ruling becomes the "law of the case" and controls all subsequent proceedings. However, the "law of the case" doctrine is not controlling "where the facts and issues are different in a subsequent appeal from what they were in the former appeal." *Grand River Dam Authority v. Grand-Hydro*, 201 P.2d 225, 227 (Okla. 1947), quoting *Missouri Kansas & Texas Ry. Co. v. City of Tulsa*, 113 Okla. 21, 238 P. 452, 456 (1925). Furthermore, this Court has held that:

> [A]n appellate court may review and reverse its former decision in the same case where it is satisfied that gross or manifest injustice has been done by its former decision, or where the mischief to be cured far outweighs any injury that may be done in the particular case by overruling a prior decision.

Smith v. Owens, 397 P.2d 673, 678 (Okla. 1963), and *Grand River Dam Authority*, 201 P.2d at 227, both quoting *Wade v. Hope & Killingsworth*, 89 Okla. 64, 213 P. 549, 551 (1923).

The sole basis for the Court of Appeals' conclusion that Wilson's case was not a rate refund action within the exclusive jurisdiction of the Commission was that, as of that date, no increased payments as a result of the Contract had been made by ratepayers to OG&E. In February of 1991, however, OG&E began making payments to AES under the Contract and, in turn, began passing those costs onto its ratepayers. Not

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[6] All of the Directors' prior filings with this Court were *discretionary* writs. Wilson failed to recognize this distinction when he specifically declined to address the merits of the subject matter jurisdiction issue in his answer brief.

until then did Wilson begin paying the rates that he claims are excessive and a result of the Directors' wrongdoing. Because of this change of material facts, we hold that the October 6, 1990, opinion of the Court of Appeals does not constitute the "law of the case."

II.

WILSON'S COMMON LAW FIDUCIARY DUTY CLAIM

Wilson's claim is based upon the novel theory that, under Oklahoma common law, the Directors breached a duty of prudent managemnt to OG&E ratepayers, analogous to that owed its shareholders. It is well settled that directors of a corporation owe a fiduciary duty to the corporation and its stockholders under the common law. *See Pepper v. Litton,* 308 U.S. 295, 306, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939); *McKee v. Interstate Oil & Gas Co.*, 77 Okla. 260, 188 P. 109, 112 (1920). However, we hold that the common law of this state does not impose such a duty with respect to customers/ratepayers of a corporation.

The United States Court of Appeals for the Second Circuit addressed a similar situation in *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984). There, the County of Suffolk, on behalf of all ratepayers of a public utility, sued the utility and others for negligence, breach of contract and warranty, and misrepresentation and concealment relating to the design and construction of a nuclear power plant. Among other things, the court rejected the county's argument that the directors of a public utility owe a fiduciary duty to ratepayers:

> Nor can we adopt appellant's suggestion that LILCO's unique status as a monopolistic-public utility should give rise to a fiduciary responsibility, in accordance with which LILCO would have to act in the best interests of its customers, not just its shareholders. Such view poses numerous problems, not the least of which is that an artificial fiduciary relationship between LILCO and its ratepayers directly contravenes the fiduciary relationship LILCO already occupies with respect to its shareholders.

Id. at 63.

We find that *County of Suffolk* delineates the correct law regarding the issue raised herein. The appellees, as directors of a publicly held corporation, already owe a fiduciary duty to OG&E and its stockholders. As was true in *County of Suffolk*, any artificial relationship between OG&E and its ratepayers would directly contravene that existing fiduciary duty.

We acknowledge that *Hargrave v. Canadian Valley Elec. Co-op.*, 792 P.2d 50, 57 (Okla. 1990), recognized a fiduciary duty on the part of the trustees of a rural electric distribution cooperative ("REC") to its ratepayers. However, *Hargrave* is clearly distinguishable from the case at bar, which concerns a corporation rather than a cooperative. Unlike the ratepayers of OG&E, the ratepayers of an REC are its members and have statutorily authorized voting rights. 18 O.S. 1991 § 437.7. In the case of an REC, there is no one other than the ratepayers/members to whom the trustees can owe a fiduciary duty. Finally, the ratepayers/members of a cooperative occupy a position of ownership analogous to the ownership of a corporation by its stockholders. The ratepayers of OG&E do not occupy the position of ownership and control that is enjoyed by ratepayers/members of an REC. No fiduciary duty is owed OG&E ratepayers by the Directors.

III.

FEDERAL PREEMPTION

Even if this State did recognize the common law cause of action which Wilson presses in this case, we would find that such action is preempted by federal law. The preemption doctrine arises from the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI., c. 2, and "invalidates any state law that contradicts or interferes with an Act of Congress." *Missouri-Kansas-Texas Ry. Co. v. State*, 712 P.2d 40, 47 (Okla. 1985). A state law is invalid, *inter alia*, to the extent that it "actually conflicts with a . . . federal statute," *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978), or when it " 'stands as an obstacle to the accomplishment and execution of the full purpose of Congress.' " *Hillsborough County v. Automated*

Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941). This Court has defined these two examples of preemption as where "an actual conflict between state and federal laws mak[es] it physically impossible to comply with both; or . . . where the objectives and purpose of Congress are thwarted by state law." *Todd v. Frank's Tong Service, Inc.*, 784 P.2d 47, 49 (Okla. 1989). The United States Supreme Court has "also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." *City of New York v. F.C.C.*, 486 U.S. 57, 63-4, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988), quoting *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986).

PURPA was enacted to encourage utility companies to purchase energy from qualifying cogeneration and small power production facilities. As previously set forth, FERC rules require such purchases. *See* note 2. A cogenerator is entitled to receive for its electricity the utility's "full avoided cost."[7] 18 C.F.R. § 292.304(a)(1), (b)(2). A utility's full avoided cost is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). *See also* 18 C.F.R. § 292.101(b)(6). By setting the rate at full avoided cost, FERC recognized that a utility's ratepayers might not receive a direct economic benefit from the utilization of cogenerated energy. Rather, " 'ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy.' " *American Paper Inst., Inc. v. American*

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[7] Under certain circumstances, a state can set rates that are lower than full avoided costs. 18 C.F.R. § 292.304(b)(3). Also, a qualifying facility and a utility can negotiate for lower rates, § 292.301(b)(1), and a state regulatory authority or any non-regulated utility may apply to FERC for a waiver, § 292.403.

Elec. Power Serv. Corp., 461 U.S. 402, 406-7, 103 S.Ct. 1921, 1924-25, 76 L.Ed.2d 22 (1983), quoting 45 Fed. Reg. 12,222 (1980). *See also FERC v. Mississippi*, 456 U.S. 742, 746, 750, 756-758, 102 S. Ct. 2126, 2130, 2132, 2135-36, 72 L.Ed.2d 532 (1982).

FERC regulations also grant cogenerators the right to negotiate a long-term purchase contract with the price of the power to be purchased based on the avoided costs of the utility calculated at the time of delivery or at the time the obligation is incurred. 18 C.F.R. § 292.304(d). Should a cogenerator choose the latter method of calculation, it has the right to receive the benefits of the contract even if, due to changed circumstances, the contract price for the power at the time of delivery is unfavorable to the utility. 18 C.F.R. § 292.304(b)(5), (d)(2). FERC recognized that such regulations might result in a "purchasing utility . . . be[ing] required to pay a rate for purchases that would subsidize the [cogenerator] at the expense of the utility's other ratepayers." 45 Fed. Reg. 12,224 (1980). However, FERC concluded that this was appropriate in order "to ensure that a [cogenerator] which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances." *Id.*

On this basis, we hold that any common law fiduciary duty imposed upon the Directors which required them to rescind the Contract would directly conflict with PURPA and FERC regulations, thereby making it impossible to comply with both. The Directors could not comply with federal mandates to honor long term, fixed rate contracts with cogenerators, while at the same time being required to rescind any such contract which, due to changed circumstances, became undesirable to ratepayers. Imposing such a fiduciary duty would thwart the objectives and purpose of Congress. PURPA was enacted to encourage electric utilities to purchase energy from cogenerators. To hold the Directors to the duty proposed by Wilson, and subject them to civil penalties for a breach thereof, would certainly stand as an obstacle to the accomplishment and execution of the full purpose of Congress as expressed in PURPA and implemented by FERC regulations.

We do not hold that all state laws governing contracts between electric utilities and cogenerators are preempted by federal law. Our

holding is strictly limited to the claims, facts and regulations discussed herein. Accordingly, we conclude that Wilson's proposed cause of action is preempted by PURPA and FERC regultions.

IV.

RATE REFUND ACTIONS

The Directors also argue that the district court lacks subject matter jurisdiction of this action because it is simply another collateral attack upon prior Commission orders and constitutes an impermissible action for a rate refund. We agree. Although Wilson's petition is styled as negligence and/or intentional tort action and request for money damages, it is apparent that Wilson's goal is to recover for ratepayers the increased rate payments occasioned by the execution of the Contract. wilson's damage claim figure demonstrates his true intent. In his original Petition, Wilson prayed for $532,898,000 in damages. As Wilson assertd in his Petition, that figure is the exact amount of "[t]he costs of the AES contract to OG&E's customers and ratepayers as projected [and] publicly announced by OG&E . . ." After discovering that the foregoing figure represented only the costs associated with the first five years of the Contract, Wilson filed a Notice of Intent to Request Permission to Amend Petition, wherein he contends that the ultimate loss suffered over the 17-32 year life of the Contract will exced two billion dollars.

In *Continental Tel. Co. of Oklahoma v. Hunter*, 590 P.2d 667 (Okla. 1979), this Court confronted a situation analogous to the present case. The subscribers to telephone service sued the defendant telephone company in district court for breach of contract for interrupted service. The plaintiffs soght damages in an amount identical to the sum of refunds due for the service not given during the period involved. We characterized the subscribers' claim as an attack upon the adequacy of the service rendered and held that such a refund/reparation action was within the exclusive jurisdiction of the Commission. Particularly compelling is Justice Opala's specially concurring opinion, wherein he stated:

> [W]henever a tribunal is called upon to determine whether utility-rendered service has earned the full charges lawfully prescribed

> therefor, less than the fixed legal rate or nothing at all, the *issue presented requires an exercise of rate-making authority* which lies exclusively in the commission. As our Constitution clearly commands, the commission's exercise of rate-making authority may never be "questioned" anywhere else except on regular review prescribed by law.

Id. at 670 (Opala, J., concurring specially) (emphasis in original).

"The character of an action is determined by the nature of the issues made by the pleadings and the rights and remedies of the parties, and not alone by the form in which the action is brought or by the prayer for relief." *Comstock v. Little*, 359 P.2d 704, 709 (Okla. 1961), quoting *Green v. Correll*, 133 Okla. 94, 271 P. 241 (1928). After examining the nature of the issues raised in Wilson's petition, and the rights and the remedies of the parties involved, we conclude that Wilson's claim is in actuality an action for a refund of rates which he claims are excessive. Those rates were established by the Contract and approved by the Commission. As such, the Commission is vested with exclusive jurisdiction over this matter. Okla. Const. art. IX, § 18; 17 O.S. 1991 § et seq. The present suit constitutes an impermissible collateral attack upon the Commission's order approving the Contract.

CONCLUSION

We recognize no common law fiduciary duty on behalf of the Directors to the ratepayers of OG&E. Therefore, Wilson's petition fails to state a claim upon which relief can be granted. If such a duty did exist, it would be preempted by PURPA and FERC regulations. Furthermore, because this case is essentially a rate refund case, jurisdiction lies with the Commission and this case is an impermissible attack upon the Commission's order approving the Contract.

The order of the district court certifying this cause as a class action and authorizing maintenance as a class action is VACATED. This case is REMANDED to the district court with instructions to DISMISS for lack of subject matter jurisdiction.

HODGES, C.J., SIMMS, OPALA, SUMMERS, WATT, JJ., concur.
LAVENDER, V.C.J., WILSON, J., concur in result.
KAUGER, J., concurs in part, dissents in part.
HARGRAVE, J., dissents.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON,

Appellee,

vs.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT N. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER and HUGH L. HEMBREE, III,

Appellants.

PETITION FOR REHEARING

The appellee, Wilson, petitions this court under Rule 28, Rules of the Supreme Court, to withdraw the opinion filed with the Clerk of this court on July 13, 1993. In support of this petition to withdraw the opinion, Wilson states:

(1) Wilson, the appellee, filed this lawsuit against the appellant Board of Directors seeking money damages for negligence. The district court dismissed the case on jurisdictional grounds. The Court of Appeals reversed and held there was no problem with jurisdiction. All jurisdictional issues were presented to this court on certiorari. This court denied certiorari. The parties returned to the trial court where all jurisdictional questions were presented once again, including a new one concerning PURPA. The trial court held for Wilson on all issues. The Board of Directors then prevailed on the trial court to grant an interlocutory appeal and certify all questions up to this court for review. This court denied certiorari on these certified questions. The Board of Directors then sought a Writ of Prohibition against the trial court on the identical jurisdictional issues. The application for a writ was denied by this court.

(2) The parties then returned to the trial court. Wilson asked for and the trial court ordered that the case proceed as a class action. The Board of Directors then instituted an interlocutory appeal on the class action certification order. This case is presently before this court on the interlocutory appeal from that order.

(3) At this point it is necessary to present facts to this court in support of this petition to withdraw the opinion that appear nowhere in the opinion under consideration.

(4) On August 11, 1992, the appellant Board of Directors filed their petition in error in this interlocutory appeal from the class action order. The petition in error disclosed the appellants intended to once again raise the previously decided issues going to the jurisdiction of the trial court to entertain this case. On the same day appellants filed a motion seeking permission to file a 50 page brief in support of their petition in error.

(5) On August 14, 1992, Wilson filed a response to both the petition in error and the motion to enlarge brief. In each response Wilson pointed out that much of what appellants proposed to bring to this court in this interlocutory appeal (the jurisdictional questions) had long since been presented and passed on by this court several times. In view of the court's subsequent order concerning the length of the brief in chief of appellants of particular note is the last paragraph of Wilson's response to the motion to enlarge brief and we quote:

> "The appellants may need more than a 30 page brief to say whatever they have to say about the class action certification issue in this appeal. However, the court should inform appellants that their brief should be limited to the question of class action certification and that the court has no need or desire to plow the same ground over on issues already decided adversely to the appellants."

(6) On August 18, 1992, this court directed the clerk to issue the following order:

> 80,097 Charles D. "Charley" Wilson v James G. Harlow, Jr. et al
>
> On written application and agreement of the parties, appellants are granted leave t (sic) file by August 31, 1992, brief in chief of 50 pages

in length. Brief is to be carefully limited to issues before the court in this appeal. Appellee is granted leave to file his answer brief of comparable length.

s/s Marion P. Opala

CHIEF JUSTICE

(7) Notwithstanding this specially tailored order from this court as to the content of their brief, the Board of Directors proceeded to file a 50 page brief, only 7 of which was directed to the class action issues in this appeal and the other 43 pages going to the jurisdictional questions.

(8) In conjunction with his answer brief, Wilson filed a motion to strike appellants' brief for a willful violation of the court's order of August 18, 1992. Wilson took the position in his answer brief that the court's order precluded any briefing on the jurisdictional issues. Wilson maintained in his answer brief that a detached study of the order in the context within which it was issued could reach no other conclusion. The use of the word "limited" in both the response and the order was significant. The use of the word "carefully" in the order was even more so. Further, Wilson maintained, if the court by the order did not intend to limit the briefs to the issues going to the class certification, then why insert the cautionary language in the first place.

(9) In any event Wilson obeyed this court's order and did not brief the jurisdictional questions in his answer brief. In his brief, Wilson assigned the limitations placed on the briefs by the August 18, 1992, order as his number one reason for not briefing these questions.

(10) Thus the matter stood on briefs before this court. The only communication Wilson received from the court during the 11 months the appeal was before this court was dated October 16, 1992, and informed the parties that the Supreme Court was going to retain the case and not assign it out to a Court of Appeals. Wilson received no notice or communication whatever that the court was *even considering* modifying its order of August 18, 1992, relative to the briefing of the jurisdictional issues. Wilson of course does not know when this court changed its mind and decided to examine once again the jurisdictional questions, but Wilson does know that he was not *requested or directed or offered an*

opportunity to brief and respond to those questions.

(11) On July 13, 1993, this court promulgated and issued the opinion herein. Wilson's motion to strike appellants' brief was ignored and has not yet been ruled upon. The opinion clearly discloses the court adopted virtually in toto the brief and argument of the Board of Directors on the jurisdictional questions in all respects.

WILSON'S CONTENTIONS

(1) After specifically ordering that such issues not be briefed, the adoption by this court of the argument and brief of the Board of Directors on the jurisdictional issues, without notice to Wilson or offering Wilson an opportunity to respond and present his position on such issues plainly deprived Wilson of procedural Due Process of Law under the Fourteenth Amendment to the Constitution of the United States.

(2) In effect, Wilson and his class of ratepayers were trapped and blind-sided through this opinion by being deprived of notice and an opportunity to be heard. The disastrous result to Wilson and the class because of lack of notice and an opportunity to be heard is underscored when there is taken into account the three previous occasions (only two in the instance of PURPA) when these identical questions in identical language were presented to this court while the court had the benefits of Wilson's argument and briefs on the questions and Wilson prevailed each and every time.

Wherefore, Wilson requests that the following steps be taken by the court:

(1) That the opinion of July 13, 1993, be withdrawn and rendered of no effect and void on the grounds that Wilson was deprived of Due Process of Law under the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States has held that under such circumstances the "slate must be wiped clean" and a new start take place.

(2) That once this opinion is withdrawn and the slate rendered absolutely clean then this court should enter its order permitting Wilson a reasonable time to file his brief on the jurisdictional issues.

RESPECTFULLY SUBMITTED,
(S)
WHIT PATE
Box 785
Poteau, OK 74953
OBA No. 006939
(918) 647-3200

THOMAS DEE FRASIER
Box 799
Tulsa, OK 74101
(918) 584-4724

GENE STIPE
Box 1368
McAlester, OK 74502
(918) 423-0421

ATTORNEYS FOR APPELLEE

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, October 5, 1993

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

80,097
Charles D. "Charley" Wilson v.
James G. Harlow, Jr., G.W. Swisher, Jr.,
John F. Snodgrass et al.

Rehearing denied.

CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Opala, Wilson, Kauger, Watt, JJ.
DISSENT: Hargrave, Summers, JJ.

(s) Ralph B. Hodges
CHIEF JUSTICE

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 80097

August 14, 1992

CHARLES D. "CHARLEY" WILSON

Appellee

vs

JAMES G. HARLOW, JR., et al

Appellants

RESPONSE TO APPELLANTS' MOTION TO ENLARGE BRIEF

What is involved herein is an interlocutory appeal as a matter of right under Title 12 OS)(993 A.6 from the trial court's order certifying this case as a proper one for a class action.

A few days after this order was entered, in a phone conversation with the attorney for appellee, appellants stated that they did intend to appeal the class certification order and inquired if appellee had any objection to appellants seeking permission to enlarge their brief. The attorney for the appellee told them such was no problem for him and that they could have some of his pages because he did not need any 30 pages on the class action certification point.

Following this appellants filed their designation of record calling for material going only to the class action certification question. This was filed July 31, 1992. The appellee filed short counter designations. The clerk of the court sent out Notice of Completion of Record for appeal on August 5, 1992.

At some point in all this the appellants apparently decided to convert a simple statutory permitted interlocutory appeal on one issue into a complete review once again by this court of all substantive issues this court has considered before in this case. On August 10, 1992, the appellants filed with the clerk of the trial court an amendment to their designation of record calling for placing in the record on appeal various motions and orders all going to questions previously decided by this court adversely to appellants. In their petition in error they once again raise these issues.

As appellee has pointed out in his response to the petition in error, the jurisdiction question was settled by the opinion of the Court of Appeals with certiorari denied in No. 72951. It was raised again in a previous interlocutory appeal and settled once again adversely to appellants in No. 78917. And again, with the same result, in No. 79192. The federal preemption and Filed Rate Doctrine issue was resolved against the appellants in No. 78917 and again in No. 79192. Whether the Court of Appeals opinion is the "law of the case" was settled in No. 78917 and No. 79192.

The legislature, in enacting Title 12 OS)(993.6 intended to confer jurisdiction on this court to hear an interlocutory appeal on a specified point, i.e., the class action certification order of the trial court. The legislature did not intend that the section be utilized for what the appellants are attempting to do here.

The appellants may need more than a 30 page brief to say whatever they have to say about the class action certification issue on this appeal. However, the court should inform the appellants that their brief should be limited to the question of the class action certification and that the court has no need or desire to plow the same ground over on issues already decided adversely to the appellants.

(s)
WHIT PATE
OBA #006939
Box 785
Poteau, OK 74953
(918) 647-3200

THOMAS DEE FRASIER
Box 799
Tulsa, OK 74101
(918) 584-4727

GENE STIPE
Box 1368
McAlester, OK 74502
(918) 423-0421

ATTORNEYS FOR THE APPELLEE

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, August 18, 1992

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

80,097
Charles D. "Charley" Wilson v. James G. Harlow, Jr. et al. On written application and agreement of parties, appellants are granted leave t file by **August 31, 1992** brief in chief of 50 pages in length. Brief is to be carefully limited to issues before court in this appeal. Appellee is granted leave to file his answer brief of comparable length.

(s) Marion P. Opala
CHIEF JUSTICE

APPENDIX F

No. 80097

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES D. "CHARLEY" WILSON
Appellee
vs
JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA W. GRIFFIN, JOHN A. TAYLOR, HERBERT N. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and, HUGH L. HEMBREE III
Appellants

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY
STATE OF OKLAHOMA

THE HONORABLE JAMES E. EDMONDSON, JUDGE

APPEAL FROM CLASS ACTION CERTIFICATION ORDER

ANSWER BRIEF OF APPELLEE

MOTION TO STRIKE APPELLANTS' BRIEF

Appellee moves the court to strike appellants' brief in chief and affirm the order of the trial court on the grounds that the brief is in direct violation of a carefully tailored order of this court which order was over the signature of the Chief Justice of this court. The court directed that appellants' brief be "carefully limited to issues before the court in this appeal." In flagrant disregard of this direct order, the appellants have filed a brief of 50 pages only 7 of which are devoted to the issues before the court in this appeal. Under the "persuasive" authority of *Matter of Estate*

of Ray, 804 P2nd 458 (Okl. App. 1990) appellants' brief should be stricken.

ARGUMENT ON STRIKING BRIEF

(Omitted from this Appendix)

PROPOSITION I

APPELLANTS' ARGUMENT IN THEIR BRIEF UNDER THEIR FIRST PROPOSITION TO THE EFFECT THE DISTRICT COURT HAS NO SUBJECT MATTER JURISDICTION OVER APPELLEE'S ACTION SHOULD NOT AND WILL NOT BE RESPONDED TO BY THE APPELLEE IN THIS BRIEF

The appellants in their brief, from pages 9 through 32, once again for multiple times, are asking this court to plow old fields one more time. Once again they urge this court to consider the federal preemption issue, the duty of care owed by a public utility's board of directors to its ratepayers issue, the collateral attack on a Commission order issue, and the rate refund issue all of which they claim deprives the district court jurisdiction to hear this lawsuit.

Appellee does not intend to fall into appellants' trap and respond once again to all these previously briefed, argued, and passed on issues. Appellee takes this position for four valid reasons. They are:

1. This court in its order of August 18, 1992, directed the briefing be "carefully limited" to the issues before the court in this appeal.

2. This court does not have cognizance over such issues in this interlocutory appeal.

3. The issues have all been previously briefed, argued, and considered by this court multiple times and appellants have been rebuffed by this court on each occasion.

4. All such issues were presented, or could have been presented, in the first appeal in this case. The opinion of the Court of Appeals decided

the issues against the appellants. This court denied certiorari. The opinion of the Court of Appeals is the law of the case.

(Further material from answer brief omitted from this Appendix)